85-1847

No.

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VITTORIO MINEO and FRANK CARLOMAGNO, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH H. WELSH
Attorney for Respondent, The Port Authority of New York and New Jersey
One Path Plaza
Jersey City, New Jersey 07306
(201) 622-6600, Ext. 7693

On the Brief:

HUGH H. WELSH
ARTHUR P. BERG
ANNE M. TANNENBAUM

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

1986

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Question Presented for Review	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	5
A. There is no conflict to be resolved by this Court	5
B. The issue is unlikely ever to recur	11
Conclusion	14

PAGE

Table of Authorities

Cases Cited

Brooks v. Village of Lincolnwood, 620 F. Supp. 24 (N.D. Ill. 1985) 3, 8, 11

Chevron Oil Company v. Huson, 404 U.S. 97 (1971) 3-6, 8, 9

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. ——, 106 S. Ct. 1018 (1986) 13

Fisch v. Bateman, 169 F.2d 266 (6th Cir. 1948), cert. denied, 335 U.S. 902 (1949) 13

Garcia v. San Antonio Metropolitan Transit Authority, —— U.S. ——; 105 S. Ct. 1005 (1985) 2, 3, 5-7, 9, 11

Kartevold v. Spokane County Fire Protection District No. 9, 625 F. Supp. 1553 (E.D. Wash. 1986) 3, 7, 10-13

Mineo v. Port Authority of New York and New Jersey, 779 F.2d 939 (3d Cir. 1985); reh. and reh. en banc denied, 783 F.2d 42 (3d Cir. 1986) 2, 3, 6, 8

National League of Cities v. Usery, 426 U.S. 833 (1976) 2-5, 8, 12

Pension Benefit Guaranty Corp. v. R.A. Gray & Company, 467 U.S. 717 (1984) 13

Thurmond v. City of Union City Tennessee, 628 F. Supp. 146 (W.D. Tenn. 1986) 3, 8, 11

PAGE

United States Constitution Cited

Tenth Amendment 2

Statutes Cited

Portal-to-Portal Act of 1947 13

P.L. 99-150, 99th Cong., §2(c) 4, 11

29 U.S.C. §201 *et seq.* (Fair Labor Standards Act) 2

Regulations Cited

29 C.F.R. §775.2(a) 4

29 C.F.R. §775.4(a) 4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VITTORIO MINEO and FRANK CARLOMAGNO, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented for Review

Should the Third Circuit have employed the "traditional governmental function" test to find that respondent, The Port Authority of New York and New Jersey, at the time

respondent was negotiating a collective bargaining agreement with the petitioner police detectives, had reasonably relied upon *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), for its belief that Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* (FLSA), overtime provisions were not applicable to its police?

Counter-Statement of the Case

As the Third Circuit correctly recognized, this matter "had its origins in a collective bargaining dispute between the [Port Authority police] Detectives and the Port Authority over the latter's [the Authority's] alleged refusal to pay the Detectives one and one-half times their regular hourly rate for hours worked in excess of forty hours a week". *Mineo* v. *Port Authority of New York and New Jersey,* 779 F.2d 939, 941 (3d Cir. 1985); *reh. and reh. en banc denied,* 783 F.2d 42 (3d Cir. 1986). Thus, this matter presents and always has presented solely the narrow question of whether the respondent Port Authority reasonably relied upon *National League of Cities* v. *Usery, supra,* in negotiating a 1980 collective bargaining agreement, obviously prior to this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority,* —— U.S. ——; 105 S. Ct. 1005 (1985), while *National League of Cities* still was good law. Despite petitioners' overly broad statement of respondent's position, the Port Authority at no time urged, either before the District Court or before the Third Circuit, ". . . that the Tenth Amendment to the Constitution precluded application of the Fair Labor Standards Act to states or state agencies". (Petition for Writ of Certiorari at p. 5).

Moreover, petitioners mischaracterize and misinterpret this Court's holding in *Garcia*. Nowhere did this Court state, referring to the FLSA, in petitioners' words that ". . . the Statute at all times remained in effect on its terms." (*Id.* at p. 6). Indeed, one will search in vain in *Garcia* for language to that effect. Not surprisingly, petitioners have not and of course cannot find textual support for their interpretation of *Garcia*. Certainly, if petitioners' language had been this Court's clear holding, it would not have been necessary for at least four federal courts to wrestle with the question of whether *Garcia* should be applied retroactively or prospectively under the standards laid out by this Court in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971). Yet, despite the petitioners' patently erroneous, unsupported, and unsupportable characterization of *Garcia*, each of these courts has held that *Garcia* appropriately is to be applied prospectively. *Mineo, supra; Thurmond* v. *City of Union City Tennessee*, 628 F. Supp. 146 (W.D. Tenn. 1986); *Kartevold* v. *Spokane County Fire Protection District No. 9*, 625 F. Supp. 1553 (E.D. Wash. 1986); *Brooks* v. *Village of Lincolnwood*, 620 F. Supp. 24 (N.D. Ill. 1985).

Petitioners take pains to point out that this Court overruled *National League of Cities* "[w]hile Respondent's Appeal (sic) was pending in the Third Circuit." (Petition at p. 5). Although petitioners' statement is chronologically accurate, it also is misleading and disingenuous in that it blithely ignores what the Court of Appeals itself, recognized (779 F.2d at 942), namely that the instant matter was held "under advisement" for well over a year pending *Garcia*, awaiting what the Court of Appeals then expected only to be a final resolution of the question of whether

mass transit qualified as a "traditional governmental function" within the meaning of *National League of Cities.*

In sum, petitioners obviously are overstating the instant case in order to place a patina of national importance upon what has now become purely a parochial matter. In reality, however, this case presents the narrow question of whether the Port Authority reasonably relied upon *National League of Cities,* as well as the Department of Labor regulations promulgated on December 21, 1979, 29 C.F.R. §775.2 (a), §775.4(a)[1] when it was negotiating the now expired December 2, 1980 collective bargaining agreement, for its belief that its police detectives were not covered by FLSA overtime provisions. At this juncture the question is important only to the parties themselves, and in view of subsequent Congressional action (P.L. 99-150, 99th Cong., §2(c)) (A64), it is a question that is not likely to recur.

---

[1] The Court of Appeals observed, "[the regulations] in relevant part, restated and adopted the . . . language from *National League of Cities*" *Mineo,* 779 F.2d at 945.

Reasons for Denying the Writ

A. There is no conflict to be resolved by this Court

Apart from petitioners' misstating this Court's decision in *Garcia* (Petition at p. 5) in order to manufacture a seeming conflict between that decision and the Third Circuit's disposition of the instant case, petitioners have offered little more than their mere disagreement[2] with the Third Circuit's analysis of the case under the standards of *Chevron* v. *Huson, supra.* Certainly, petitioners' dissatisfaction with the result below is not enough to warrant this Court's grant of a writ of *certiorari.* Thus, petitioners have not and, we submit, cannot offer any evidence of conflict among the circuits with respect to the retroactive effect of *Garcia* so as to warrant review by this Court. Petitioners' inability in this regard is not surprising since, as we pointed out above, the four federal courts, of which we are aware, which have dealt with the

---

[2] In a desperate attempt to create an issue to peak the interest of this Court, petitioners in their Point II ask the Court to review the "issue" of the plenary power of Congress pursuant to the Commerce Clause over entities created by interstate compact. (Petition at pp. 15-18). This purely collateral issue, thrown in by petitioners as an afterthought below, is simply not presented by this case. As we had urged before the Circuit Court, below, there are no degrees of plenary. Indeed, this Court in *National League of Cities, supra,* presumed the plenary power of Congress under the Commerce Clause. 426 U.S. at 840. In any event such question is no longer germane, as the Third Circuit correctly noted: "When *Garcia* overruled *National League of Cities,* these . . . issues became moot because all state activities became subject to FLSA." 779 F.2d at 944. Since this issue, if such issue ever was appropriately raised, is no longer germane, we urge the Court to allow resolution of the question to await the day, if such day ever should come, when it is relevant.

question, all have found that *Garcia's* repudiation of the traditional governmental function test, as unworkable, was an overruling of a "clear past precedent", *Mineo, supra,* 779 F.2d at 944, citing *Chevron,* 404 U.S. 97, 106, which, as a matter of equity and fairness, should be applied prospectively.

Thus, the Third Circuit herein held:

> "In this case, the defendant reasonably relied on the law in force at the time it conducted labor negotiations, and it is unfair to make it suffer because of an unforseen change in that law." 779 F.2d at 944.

In coming to this conclusion, the majority, per Van Dusen S.C.J. reasoned:

> "As the Port Authority structured its contract with the Detectives, it was not in compliance with certain aspects of FLSA. The Port Authority's conclusion that the terms of this contract were exempt from FLSA was based on the Port Authority's assessment of two questions of law. First, the Port Authority, an entity created by bi-state compact, is a state for the purposes of the Tenth Amendment and the *National League of Cities* case. Second, the Detectives were performing a traditional state function because they were engaged in the activity of police protection.... When *Garcia* overruled *National League of Cities,* these two issues became moot because all state activities became subject to FLSA." *Id.*

To the same effect is *Kartevold, supra,* 625 F. Supp. 1553 (E.D. Wash. 1986), where the District Court dismissed an action in which the employees of the defendant fire district sought to recover unpaid overtime and statutory damages under FLSA. In finding that *Garcia* had overruled settled prior law, the *Kartevold* Court stated:

> "For all of this manifest hostility, however, there is one truism which must control the instant inquiry. *National League of Cities* was the law. It was 'clear precedent' within the meaning of *Chevron, supra,* from the date of announcement forward until struck down in *Garcia.* As noted by Justice Powell in his dissent in *Garcia, National League of Cities* had on occasion been distinguished and narrowed, but 'there was no hint . . . that *National League of Cities*—or its basic standard—was subject to the infirmities discovered today." 625 F. Supp. at 1557.[3]

Further that:

> "It bears noting that *Garcia* did not involve a minor point of fine-tuning the law. On the contrary, the decision raised and decided issues which go to the

---

[3] Petitioners' argument that the decision in *Garcia* was "foreshadowed" (Petition at pp. 12-13) is not well taken. As the Court noted in *Kartevold, supra*:

> "... as plaintiffs concede, the 'clearly foreshadowed' language of *Chevron* applies by its own terms only to cases of first impression. Whatever else might be said of *National League of Cities* and its sequelae, it can hardly be claimed that *Garcia* was a matter of first impression. Thus, the relevant inquiry is whether *Garcia* represented a break from 'clear past precedent'." 625 F.Supp. at 1556.

> conceptual heart of defining the nature of government. *Garcia* has been characterized in briefing as 'just another skirmish' in a see-sawing battle which has raged since the founding days of the Nation. . . . It is precisely because of the fundamental nature and tulmultuous (sic) quality of this ongoing tug-of-war with basic constitutional values that the Court feels obliged to place heavy emphasis on the first prong of *Chevron,* and to consider the sharp break represented by *Garcia* as impactive on the third prong as well." *Id.* at 1559.

In accord is *Thurmond, supra,* 628 F. Supp. 146, 148 (W.D. Tenn. 1986): "*Garcia* overrules the clear past precedent of *National League of Cities, supra,* that the Tenth Amendment limited Congress' power to require FLSA compliance of state and local governments in areas of traditional governmental functions." See too, *Brooks, supra,* 620 F. Supp. 24, 26 (N.D. Ill. 1985).

As to the second prong of *Chevron,* namely, whether or not retrospective application would favor or retard the purpose or operation of the newly announced rule, *Mineo,* 779 F.2d at 945, citing *Chevron,* 401 U.S. at 106-107, these courts have either held that factor to be neutral *Mineo* (*Id.*)—or that retroactive application actually would retard the rule's operations or purposes *Thurmond, supra,* 628 F. Supp. at 148; *Brooks, supra,* 620 F. Supp. at 26—or that this factor, even if favoring retroactive application, did not in and of itself outweigh the other two factors *Kartevold, supra,* 625 F. Supp. at 1557.

On the third factor—the "inequities that would result from retroactively applying the new law", *Mineo,* 779 F.2d

at 946, citing *Chevron,* 404 U.S. at 107, the four federal courts again were in agreement that retrospective application of *Garcia* would create substantial inequities. Thus, in the instant case, the Third Circuit held:

> "The Port Authority was faced with a situation where it had to predict what the law was on two different issues. It made a decision and based its contract thereon. . . . Over four years later, the *Garcia* decision overruled the entire relevant body of case law. Applying *Garcia* retroactively would punish the Port Authority for having made a decision which we agree is based on an accurate assessment of the law at the time such decision was made.
>
> • • •
>
> "Inasmuch as the Port Authority encountered an unresolved issue of law, on which it took a reasonable position, retroactive application of *Garcia* to foreclose its reliance on *National League of Cities* is not equitable. Employing the rule of *Garcia* in this case is thus contrary to both the first and third prongs of the *Chevron* test." (citations omitted) 779 F.2d at 946.[4]

---

[4] We are mystified by the statement on page 13 of the Petition, reminding the Court "... of its own expressed sentiments regarding the right of a public entity to the funds allocated to it...", in view of the Third Circuit's explicit finding, which has gone unchallenged by petitioners, that retrospective application of *Garcia* to the Port Authority would result in an uncalled for "windfall" to the petitioners, 779 F.2d at 946, who had bargained for premium base pay in the 1980 collective bargaining agreement in lieu of their coverage by FLSA overtime provisions.

The District Court's decision in *Kartevold* again is fully in accord:

> "Implicit in the first *Chevron* prong is the notion that case law affords a foundation for day-to-day decision-making which is worthy of reliance. It is a rare transaction entered into by anyone in which the parties do not have in mind certain expectations which society would deem wholly warranted. Seldom if ever does the typical citizen consciously reflect on the source of such expectations, but there is no disputing the fact that in any jurisdiction grounded on common law development of legal principles, the source, either directly or indirectly, is to be found in judicial construction. The Supreme Court has recognized that the doctrine of *stare decisis* is not simply a mechanical tool employed by the judiciary to cut its work load. Rather:
>
> > 'We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.'
>
> "That policy is disserved when thousands of public officials across the country, such as the fire district commissioners in the instant case, proceed in good faith to discharge their duty by entering into contractual agreements with their employees and on behalf of their constituency in reasonable reliance upon longstanding precedent, only to have their efforts declared retrospectively unlawful. It is unfair to the public officials to their taxpayers, and to the system at large." 625 F. Supp. at 1558-1559.

To the same effect is *Thurmond, supra,* 628 F. Supp. at 148: "[i]t would be unfair to hold Defendants to a rule not in force when they made the key decisions at issue in this cause."; *Brooks, supra,* 620 F. Supp. at 26: "It would be unjust to hold defendants to a rule that did not exist at the time their policies were in effect."

It is clear that each federal court that has addressed the issue, has found *Garcia* to warrant prospective application. Thus, there is no reason for this Court to review this matter to resolve any "conflict" or "disagreement" among the lower federal courts in their application of *Garcia.*

B. The issue is unlikely ever to recur

In their Supplemental Argument (Petition at pp. 19-20) petitioners obviously are conceding, as they must, that the Congressional response to *Garcia,* namely P.L. 99-150, 99th Cong., November 18, 1985, the "1985 Amendments" (A63-64), specifically Section 2(c), makes clear that the Congressional intent is to have the effect of *Garcia* be felt prospectively only. As the Court in *Kartevold* noted, citing, *inter alia,* the Senate Report accompanying the 1985 Amendments:

> "State and local government employers who are engaged in traditional functions as described by DOL at 29 CFR 775.2 and 775.4 (schools, hospitals, fire prevention, police protection,[5] sanitation, public

[5] Congress' language in Section 2(c)(A64) further demonstrates the correctness of the Third Circuit's analysis of the issues in the instant case.

> health, parks and recreation, libraries, museums) are therefore exempt from FLSA overtime liability until April 15, 1986. The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities." S. Rep. No. 99-159 at p. 15, *reprinted in, U.S. Code Cong. & Ad. News,* 663 (1985), quoted at 625 F. Supp. at 1561.

Thus, the Court in *Kartevold* was satisfied that

> "Congressional intent to declare a moratorium and thereby forestall the economic impact of *Garcia* is manifest. . . . Somewhat more complicated, perhaps, is the equally apparent observation that Congress also intended to cut off liability incurred as a result of *Garcia nunc pro tunc* to the date the decision was announced." *Id.* at 1562.

It is perfectly obvious that the conundrum faced by the Third Circuit and the three District Courts cannot reasonably be expected to arise again. Congress has spoken! By legislative fiat, entities which had reasonably relied upon *National League of Cities* are not to be held to retroactive application of the Fair Labors Standards Act.

Petitioners urge, however, that the effect of these 1985 Amendments should be ignored by this Court since in petitioners' words:

> ". . . any such purported effect is inappropriate as the rights of these Petitioners accrued and became vested under the Fair Labor Standards Act prior

> to the enactment of the Amendments. . . ." Petition at pp. 19-20).

Again, petitioners are being disingenuous. It is well-settled that Congressional enactments are not unconstitutional merely because they have a retroactive application. Something more, for example a due process violation is required. See, generally, *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. ——, 106 S. Ct. 1018 (1986) and *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Company,* 467 U.S. 717 (1984). Moreover, it was long ago held, in a challenge to the Portal-to-Portal Act of 1947, that FLSA standards are not vested rights within the meaning of the Due Process Clause, *Fisch* v. *Bateman,* 169 F.2d 266, 270 (6th Cir. 1948), *cert denied,* 335 U.S. 902 (1949).

Thus, on the issue petitioners attempt to raise in their supplemental argument, we commend to the Court for its accuracy and wisdom, the reasoning of the *Kartevold* Court:

> "The rights asserted are based on the 1974 FLSA amendments which, for purposes of the instant action, became effective on January 1, 1975. P.L. 93-259; 88 Stat. 55, §6(c)(1)(A). Such rights were terminated in mid-1976 by *National League of Cities.* Those rights were revived nine years later by operation of *Garcia.* In the final analysis, however, the *Garcia* Court created no rights on its own authority. Minimum wages and overtime are not, when all is said and done, the result of principles known to the common law. Rather, *Garcia* merely gave force to rights created by Congress. If in its wisdom Congress chooses to impose a moratorium on the avail-

ability of substantive rights created in the first instance only by legislative action, it is likely well within its plenary powers under the Commerce Clause to do so, at least in the absence of a due process violation. Given the fact that neither governmental employers nor their employees knew they had any rights or duties under the 1974 FLSA amendments pre-*Garcia,* and in point of fact had none, it is difficult to see how anyone could have relied upon the efficacy of those amendments." 625 F. Supp. at 1562-1563.

CONCLUSION

In view of the foregoing, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HUGH H. WELSH
Attorney for Respondent, The Port Authority of New York and New Jersey
One Path Plaza
Jersey City, New Jersey 07306
(201) 622-6600, Ext. 7693

On the Brief:

HUGH H. WELSH
ARTHUR P. BERG
ANNE M. TANNENBAUM

Dated: June 5, 1986